



In the Matter of:

WILLIAM J. BETTNER,

ARB CASE NO. 01-088

COMPLAINANT,

ALJ CASE NO. 00-STA-041

v.

DATE: October 31, 2003

DAYMARK, INC.,

RESPONDENT.

BEFORE THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul D. Taylor, Esq., *Truckers Justice Center, Eagan, Minnesota*

For the Respondent:

Sara L. Thomas Esq.; Donald J. Vogel, Esq., *Michael, Best & Friedrich, Chicago, Illinois*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997), and the regulations implementing that provision, 29 C.F.R. Part 1978 (2002). Daymark, Inc. employed William J. Bettner as a truck driver. Bettner alleges that he engaged in conduct protected under the STAA (by filing a prior complaint against Daymark under the STAA whistleblower provision and participating in activities related thereto, making safety-related complaints about trip scheduling, and by refusing to drive in violation of the Department of Transportation's "fatigue rule") and that Daymark retaliated by not promptly reinstating his health insurance as required by the agreement settling his prior STAA complaint against Daymark, issuing two unsatisfactory performance reports, discharging him (by improperly treating a message he sent to the company as a resignation), and not rescinding the resignation or rehiring him. He further argues that he was constructively discharged. These charges were investigated by OSHA, which found no STAA violations, and were the subject of a Department of Labor hearing before an Administrative Law Judge (ALJ). The ALJ found that Daymark had committed a de minimus violation of the STAA by not immediately reinstating Bettner's medical benefits

(after he returned to work pursuant to the settlement of his prior STAA claim). On the other issues, the ALJ found that Bettner had not shown by a preponderance of the evidence that Daymark acted in retaliation for Bettner's protected activities. Recommended Decision and Order (R. D. & O.). Because Daymark fully reimbursed Bettner's medical expenses by December 1998, the ALJ found no further remedy was required, and recommended that Bettner's complaints alleging other violations of 29 U.S.C.A. § 31105(a)(1) be dismissed. We reverse the ALJ's decision on the health insurance issue and deny Bettner's complaint on all issues.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the ALJ's R. D. & O. and to issue the final agency decision pursuant to 29 C.F.R. § 1978.109 (c)(1) and the Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). We review the ALJ's findings of fact under the substantial evidence standard. "The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered as conclusive." 29 C.F.R. § 1978.109(c)(3). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, (1951). We accord special weight to an ALJ's demeanor-based credibility determination. *Poll v. R.J. Vyhnalek Trucking*, ARB No. 98-020, ALJ No. 96-ERA-30, slip op. at 8 (June 28, 2002). In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

BACKGROUND¹

Daymark originally hired Bettner in May 1996 and discharged him on October 18, 1996. He filed a STAA complaint and was reinstated in May 1998 pursuant to a settlement which this Board approved. (ARB No. 98-124, ALJ No. 97-STA-23; CX 6). The settlement provided that Bettner would be entitled to all benefits "the same as if his employment with the Respondent had been continuous." (CX 6, p. 3).²

¹ The information cited here is drawn from the record of the hearing before the Administrative Law Judge.

² In this case JX stands for joint exhibits, CX stands for Complainant's exhibits and RX stands for Respondent's exhibits.

Health Insurance and Payment of Medical Claims

When Bettner returned to work, Daymark was changing insurance companies. Bettner was requested to fill out forms in connection with insurance coverage. However, until July 1998 he refused to do so because he believed that, in violation of the settlement agreement, Daymark was treating him as a new (rather than reinstated) employee. Bettner finally submitted the forms after Allison Pierce, Daymark's Vice President of Safety/Human Resources, advised him that he had to complete them to obtain life insurance with his wife as beneficiary. (T. 43, 297). The insurance company began processing Bettner's bills in October 1998 and all Bettner's medical bills were paid by the end of December 1998. (T. 46, 291-297, JX 19).

The October 1 Meeting

Because Pierce was concerned that the employer-employee relationship with Bettner was not going well, and wanted to resolve differences and move forward on a more positive note, he suggested a face to face meeting with Bettner. On October 1, 1998, from 7:30 or 8:00 a.m. to approximately 2:00 p.m., Pierce, Jim Lape (Bettner's dispatcher) and another Daymark official met with Bettner to discuss seven issues Bettner had raised. (T. 335-337). In a letter to Bettner dated October 6, 1998, Pierce listed the issues (Delay Pay (Pa on 9-3-98), Lumber[sic] Charge (Chicago 9-14-98@ \$225), Overweight ticket (8-28-98), Short Runs, Dispatched on 1548 mile run in 2 days (7-22-98), Scheduled loads to [sic] close together, The way (or method) we calculate mileage [sic] point-to-point) and provided a summary of what had been determined concerning them. Pierce also noted that Bettner was "in receipt of two warning notices for late delivery and trust you understand that future service failures because of your negligence will be grounds for further disciplinary action." In the letter Pierce pointed out that the warning form for the two notices provided space for Bettner's rebuttal, and Bettner could return the form to his attention. (JX 11). On October 22, 1998, Bettner submitted rebuttals to the "Unsatisfactory Performance Reports." (JX 3; JX 5). The October 1 meeting issues which are part of Bettner's constructive discharge claim, and the unsatisfactory performance reports, are described in greater detail below, as well as communications relevant to the alleged discharge and failure to rehire.

July Trip to Arlington, Texas

At the October 1 meeting, Bettner complained to Daymark about his July 22, 1998 assignment to deliver a load from New Kingston, Pennsylvania to Arlington, Texas on July 24, 1998. According to Bettner, the trip was originally set up for him to cover 1545 miles within 48 hours. Bettner contended that this would have required him to violate Department of Transportation regulations. (T. 71, JX 11, p. 2). At the hearing, Bettner testified that he did not receive the load in New Kingston until 10:30 p.m. on July 22, 1998, and the delivery was scheduled for 1900 hours on July 24, 1998. (T. 71). Bettner's log indicates he arrived in Arlington, Texas on July 25 at 1:00 p.m. (CX 1, p.

13). Bettner conceded, at the hearing, that Daymark did not discipline him for being late. (T. 195).

Pierce's October 6 summary stated that this is a legal run, and, responding to Bettner's contention that he did not have the hours to run it, noted that Bettner's log showed him as "on-duty not driving" when he did not have loading or unloading responsibilities. "Your explanation was that you can't just go to sleep and you just walk around. We suggest you make efforts to gain sleep in the sleeper berth and avoid the fatigue factor the remainder of the day." (JX 11, p. 2).

At the hearing, Pierce and Curtis Singleton, Daymark's Risk Manager since February 2000, both testified that it was possible to make a 1545-mile trip within two days. (T. 376, 377, 403). Singleton noted that the previous day's travel could affect the calculation. (T. 417, 418). He also conceded that on duty not driving time for activities such as refueling and vehicle inspection could have an effect. (T. 418, 419).

Unsatisfactory Performance Report for Late Delivery of August Load to Chattanooga and Failure to Weigh Load

Bettner received an unsatisfactory performance report from Daymark, dated "8/28/98", for his trip from Indianapolis on August 26, 1998, to Chattanooga on August 27, 1998. The report cited "late for delivery Appt Time 1500 Arrived at 19:21" and "Other: Did not weigh ld at Indy when he picked it up" as the reasons his performance was deficient. On the form, in his October 22 rebuttal, Bettner noted the original appointment time of 9:30 a.m.³ and contended that driving from Columbus, Ohio to Indianapolis (where he picked up the load) and then from Indianapolis to Chattanooga as expected would have caused him to break the U.S. Department of Transportation's 15-hour rule.⁴ Additionally, he stated that meeting the revised delivery time of 3:00 p.m. would have required him to drive at 82 mph., and questioned whether the driver who had brought the load to Indianapolis had been written up for not weighing the load. He suggested that if the other driver was not similarly written up, he was being improperly

³ On the morning of August 27 Lape revised the time to 1500 (3:00 p.m.).

⁴ 49 C.F.R. § 395.3(a)(2) provides, with limited exceptions, that "no motor carrier shall permit or require any driver used by it to drive, nor shall any such driver drive: ... for any period after having been on duty 15 hours following 8 consecutive hours off duty." Further, with limited exceptions, no driver may drive more than 10 hours following 8 consecutive hours off duty. 49 C.F.R. § 395.3(a)(1). Drivers using sleeper berth equipment "may cumulate the required 8 consecutive hours off duty, as required by Sec. 395.3, resting in a sleeper berth in two separate periods totaling 8 hours, neither period to be less than 2 hours." 49 C.F.R. § 395.1(g).

singled out. JX 3, p. 2, 3.

At the hearing, Bettner testified that on August 26 he was delayed for over two hours in getting to Indianapolis because the locking pins for the sliding axle on the trailer were not locked and because he had to weigh the trailer in London, Ohio and slide the axles to get the weight on the tandems (the two trailer wheels) to the legal weight. Additionally, he stated that after picking up the load in Indianapolis, he stopped twice and slept for a total of eight hours because he was fatigued and felt it was unsafe to drive. (T. 79-84, CX 1, p. 14). Bettner's log showed his arrival time in Chattanooga as 6:00 p.m. (CX 1, p. 15).⁵

Bettner testified on direct examination that the 9:30 a.m. August 27 delivery time was changed on the morning of August 27 after Lape contacted him and he advised that he had to stop and sleep. (T. 87, 95, 96). He also stated that when he picked up the load he told Daymark that he could not make the 9:30 a.m. appointment, but did not say why, and that at the October 1 meeting he had told the Daymark officials that he stopped because he was "sleepy, tired, and there was just too many miles." (T. 131). On cross-examination, Bettner admitted that in a pre-hearing affidavit he had stated that he had sent a Qualcomm message to Daymark saying only that he could not make the delivery appointment because it was "too far." (T. 223). Bettner conceded that on August 26, 1998, at 8:15 a.m. he had a fresh 15 hours and could have driven for ten hours without violating the 15-hour rule; however, he drove for only 5 ¼ hours for the rest of that day. (T. 220, 221). He also agreed that on the morning of August 27 he had another fresh 15 hours and could have driven 10 hours that day without violating the 15-hour rule (because he had taken a 2 ½ hour nap in the middle of the day on August 26, in addition to the sleep he had beginning at 11:30 p.m. on August 26). (T. 224).

Pierce testified that at the October 1 meeting Bettner only cited the axle problem and the overweight ticket as his reasons for being late. (T. 346). Pierce confirmed that adjusting axles is not unusual. (T. 385). However, because Bettner never requested assistance (dispatch could have arranged for assistance), did not report the axle sliding problem or the delay it caused at any point during his trip, and no subsequent driver reported a problem with sliding the axles, Pierce was inclined not to believe Bettner's assertion that he was delayed for over two hours on that account. (T. 345-347).

⁵ The log time is Central Time, the delivery time was Chattanooga time, which was Eastern time. T. 225. It is not clear from the record whether the log time was Central Standard Time or Central Daylight Time, while the Chattanooga time in August would have been Eastern Daylight Time. Bettner, however, agreed that there was an hour difference between the log time and the Chattanooga time. T. 225. The Qualcomm time is taken from when the driver punches in his arrival time. Bettner thinks he did not punch in his time immediately when he arrived. (T. 100).

According to Pierce, if Better had called in his problems they would have changed the delivery time and he would not have been late, but he did not do so. (T. 384). Further, if Bettner became too tired to safely drive he should have notified dispatch, in addition to pulling over and stopping to sleep. (T. 386). Pierce also noted that at the October 1 meeting, Bettner had wanted Daymark to pay for the overweight ticket even though Bettner had failed to scale out the load in accordance with company policy. (T. 345).

Singleton testified, based on his review of Bettner's logs, that Bettner failed to arrive on schedule in Chattanooga because of poor time management; he was taking unnecessary time off or using his time unwisely. (T.404, 408). He also noted that drivers are to report any tickets and to weigh loads each time a load is picked up to be sure that the load is legal. (T. 406-407, RX 7, p. 11-8). Daymark's handbook states that drivers are responsible for all over weight tickets. (JX 20).

Pierce's October 6 summary, under the topic "Overweight ticket (8-27-98)" stated that the load was not over gross, and "we pay scale tickets as the scales were across the street from where you picked up." As to Bettner's late delivery, it stated "You were also late on the load. You explained that it took you two and one half hours to get the trailer slide to work which caused you to be late. This is an excuse as you state a mechanical problem and did not send a qualcomm message per the handbook." (JX 11, p. 2).

Unsatisfactory Performance Report: September Late Delivery of Load to Fogelsville, Pennsylvania

Bettner received an Unsatisfactory Performance Report from Daymark dated "9/03/98" for a delivery to Fogelsville, Pennsylvania. The reason marked on the report form was "Late for Delivery Appt. Time 14:00 Arrived at 15:01." (JX 5, p.1-3). Bettner's October 22 rebuttal, entered on the form, was that he was blocked in by three trucks in the early morning hours of September 3, and that Daymark ignored the facts that he sent an earlier dispatch on September 3 that he was stopping for safety reasons, that he had been on duty or driving on September 2 for 10.5 hours and was fatigued when he stopped, and that he received the load on September 2 at 9:00 p.m. in London, Ohio and had to travel 469 miles to Fogelsville. He further commented that the dispatch was very unreasonable and no doubt illegal and that he should get detention time. (JX 5, p. 2, 3).

On September 2, 1998, Bettner was in his sleeper berth from 12:00 a.m. to 8:00 a.m. (CX 1, p. 16). According to his testimony, he then spent seven and a half hours unloading and doing a piece count⁶ in Columbus, Ohio before driving for half an hour to London, Ohio. In London he was to pick up the Fogelsville load from another driver. He

⁶ Bettner's testimony on direct examination was that he spent six and a half hours doing the unloading and piece count. (T. 117, 118). His log records his on duty not driving time as seven and a half hours. (CX 1 p. 16).

spent one hour off duty and three hours in the sleeper berth before the other driver came, and then took an hour to eat. After next spending a half hour (from 8:45 – 9:15 p.m.) to exchange loads and inspect his vehicle, he drove to Old Washington, Ohio, where he stopped to sleep (at 11:15 p.m.) because he was tired. (T. 119-123, 225- 228).

At 4:45 a.m. on September 3, 1998, Bettner arose and found that he was blocked-in by a J.B. Hunt truck. He sent a Qualcomm message to Daymark advising that he could not get out of the parking space, was going to have coffee, and if no one moved would go back to bed. “The load can just get there when it gets there.” (T. 124, 233, JX 4). Bettner then went into the truck stop for forty-five minutes to use the restroom and eat. (T. 126). He normally takes “fifteen minutes, a half hour, an hour sometimes” for such activities. (T. 127). He did not check during that time to see if the truck blocking him had left. (T. 234). When he came out, the truck was gone. (T. 126). He then conducted a fifteen-minute vehicle inspection before driving one hour to Wheeling, West Virginia, where he stopped for a half-hour for fuel. (T. 128; CX 1, p. 17). After fueling, he drove for two hours before stopping in Somerset, Pennsylvania because he wanted to talk to Pierce about a Qualcomm message he had received from Lape saying he should have been further down the road. (T. 134, 235, CX 1 p. 17). Forty-five minutes to one hour of his one hour and fifteen minute stop in Somerset was spent talking to Pierce; he “got a donut or something” during the rest of the time. (T. 132-134, 235-237, CX 1 p. 17). According to his log and testimony, Bettner left Somerset at 10:30 a.m. and arrived in Fogelsville at 2 p.m. His truck was not unloaded until 11 p.m. Bettner spent from 2:00 p.m. to 10:00 p.m. in the sleeper berth, and from 10:00 to 11:00 p.m. off duty. (T. 131-135). When Bettner subsequently requested delay pay, Lape informed him that such pay was not given to drivers who delivered their loads late. (JX 6 pp.1-3).

At the hearing, Bettner said that he advised Daymark that he was stopping at Old Washington for safety reasons and that he thought he had called to tell Daymark when he was loaded in London. (T. 129, 229, 230). This differed from his deposition testimony that he did not tell Daymark he was stopping, and had not advised Daymark that the load was three hours late initially because he was waiting for the driver or that he was loaded. (T. 230, 231, 233). Bettner conceded that if he had not stopped to talk to Pierce he would have been on time. (T. 237).

Pierce testified that Bettner’s request for delay pay in connection with this run was discussed at the October 1 meeting. They reviewed his logs with him and showed him that he could have been on time if he had not spent so much time on the telephone talking with Pierce or doing other things. (T. 337-338). Pierce stated that Bettner did not receive delay pay because he was late for reasons within his control. (T. 340- 341). It was Singleton’s opinion that Bettner was late due to poor time management. (T. 408).

Pierce’s October 6 summary with respect to the item “Delay Pay (Pa on 9-3-98)” stated,

The load had a 1400 hr appointment time. You accepted the appointment commitment the previous day with ample hours to accomplish. You admitted being one hour late and the receiver “worked you in” for delivery. Your excuse for being late was that you stopped at a truck stop and was blocked in. You qualcomm saying you were going back to bed and that “the load can get there when it gets there”... Delay Pay, as noted in our handbook, is paid for the excessive time between your appointment and unloading. You admit being late and not eligible for said pay.

(JX 11, p. 1).

Dispute over hiring lumpers

On September 15, 1998, Bettner delivered a load in Chicago. (T. 143-144). Bettner testified that he hired two people, “lumpers”, for \$225, to unload the truck, and then sent a Qualcomm message asking Daymark to authorize payment. A series of exchanges ensued in which the Daymark dispatchers responded that they could not pay such a high amount. (JX 8, pp. 1-29). Bettner subsequently submitted a purchase order for \$225 to Daymark, but did not receive reimbursement. Instead, he was paid \$52, the standard rate for unloading the shipment himself. (T. 151-155, 344). Bettner testified that he had never been denied a request to hire a lumper before, but admitted on cross-examination that he had never requested so high an amount and that he sent in a purchase order for one lumper although he claimed to have hired two. (T. 150-152, 243-245, JX 9).

Pierce stated that the \$225 reimbursement request was denied because the amount claimed was excessive and Bettner did not request prior authorization for the hiring of the lumpers. (T. 341-344). He pointed out that the highest lumper reimbursement amount Bettner had previously received was \$150, and stated that the company had sought the lumper Bettner identified, but was unable to find him. (T. 341-344; JX 12).

Maribel Baker, Personnel Manager at Daymark, testified that Daymark had rejected other drivers’ requests for lumper reimbursement, and noted that there were two problems with Bettner’s reimbursement request: purchase order approval was not given for the amount which exceeded what the customer had contracted to pay, and the receipt showed one person being paid \$225 to unload the truck but Bettner said he hired two. She noted that the company receiving the delivery had contracted to pay \$70 for unloading and suggested a mistake might have been made in paying Bettner \$52, rather than \$70. (T. 438-441). Countering this possible underpayment, she observed that Bettner had been overpaid more than that amount for travel expenses to retrieve his truck after vacation. (T. 431-435).

Pierce's October 6 summary noted that Bettner had hired the lumber without pre-authorization, and requested \$225, although the 22 authorizations for lumps he had received since May 27, 1998, averaged \$75, with the highest being \$150, and only five being above \$100. Moreover, the basic load and unload pay was "\$1.50 per 100 wt."⁷ The summary recounts

You acknowledge that lumber fees should be reasonable and you stated "I guess a line should be drawn." Your reasoning [sic] that...the handbook reference for purchase orders was the basis for your position. Daymark procedures are for management to approve lumps and lumps are not specifically noted in the handbook. We appreciate your statement "if it's not in the handbook, I don't want it."

Locksmith Charge

At 3:00 a.m. on October 14, 1998, Bettner parked his truck and exited to relieve himself, leaving his keys in the vehicle. (T. 157). Leaving keys in the ignition violated Daymark policy. (T. 355; RX10, Tab 10, Section 49). When he returned, he found that the truck's doors were locked. (T. 158). He called the dispatcher who arranged for a locksmith. (T. 161; JX-14, 15). Daymark paid the locksmith's charge of \$127.25. When Daymark subsequently advised Bettner that it would be deducting the locksmith's charge from his pay, Bettner argued that the lock had malfunctioned and Daymark did not have authority to make the deduction. (T. 162). Bettner had executed a consent permitting Daymark to deduct "personal advances." Daymark considered this authorization for the deduction; however, Bettner did not. (T. 245, 356; JX 21). The lock malfunction was not listed on Bettner's trip report, the subsequent driver of Bettner's truck did not report any malfunction, and there was no subsequent report of the lock's repair during the period Pierce was with the company. (T. 355).

Communications Subsequent to the Locksmith Charge

On November 13, 1998, Bettner sent a Qualcomm message to Lape, his dispatcher, stating "AT THE PRESENT TIME THIS WILL BE MY LAST LOAD FOR DAYMARK. YOU OR MR. PIERCE DEDUCTED \$127 FROM MY CHECK AND TO ME AS I SAID BEFORE IS THEFT." (T. 163-164, JX 17, p. 2).

According to Bettner, he sent the message because he was upset about the \$127 deduction and because of "everything else that had gone on prior to that," which he

⁷ The \$1.50 figure apparently was a typographical error, since Pierce testified "You know we figure 15 cents a hundred-weight." (T. 342).

described as getting short runs, Daymark's taking a truck away from him,⁸ their refusing to pay for a lumper, and their refusing to pay for medical insurance. (T. 164). Bettner believes he also called Pierce on the same day and left a voice message about the \$127 locksmith charge, asking Pierce to call Mrs. Bettner; but that he did not tell Pierce that he had resigned. (T. 165-166). On November 15, 1998, Bettner faxed a handwritten letter to Pierce regarding the locksmith fee. It did not mention his leaving the company. (T. 167-168, JX 18).

Bettner testified that after he unloaded and was heading back to Rochelle, Lape notified him "your resignation has been accepted or something on that order," and he responded "Don't you think you're jumping the gun?" (T. 169-171, 258). Bettner recalls getting a message back, but not what it said. (T. 171). Bettner testified that subsequently when he arrived at Rochelle, Illinois on November 16 he was told to clean out his truck; he understood "clean out your truck" as meaning that you have been fired, although he admitted that he had also been told to clean out his truck when he went on vacation. (T. 172, 254, 255). He does not remember when his next communication with Daymark occurred. (T. 173).

Although Bettner testified that he never said "I quit," he confirmed the following exchange at his deposition:

Q Page 37. " Answer: All Bud Pierce had to do was put the \$127.25, a Comm Check, and send it to me, and it wouldn't be my last load."

"Question: If he didn't do that, what did it mean then? If he didn't put the \$127 back into your account, what does it mean then? It was your last load?"

"Answer": It means I would quit."

"Question: Okay. And Bud Pierce never put the \$127 back in?"

"Answer: No, he didn't."

(T. 253).

⁸ This apparently referred to Daymark's assignment of the truck Bettner had been driving to another driver when Bettner took vacation. (T. 322).

Pierce testified that both Lape and Bettner's wife told him that Bettner was leaving the company, and that he asked Mrs. Bettner to have her husband call him to discuss the matter. (T. 357, 360). On November 16, 1998, Bettner called Pierce about a cargo claim. When Pierce sought to discuss Bettner's quitting, Bettner responded that he did not have time to talk about it then, but would talk to him later. (T. 359-360). Bettner did not do so. (T. 360).

Because Bettner had not called him back, on November 23, 1998, Pierce sent Bettner a letter which stated that he had attempted to contact Bettner to discuss both the deduction of the locksmith fee and Bettner's Qualcomm message resigning his employment with Daymark, and had left messages with Bettner's wife, but had not heard from him. (T. 360). The letter advised Bettner that Pierce considered Bettner's resignation effective November 13. (RX 5).

According to Pierce, both he and Lape construed Bettner's Qualcomm message as a resignation. (T. 369). Pierce testified that Lape did not have authority to discharge Bettner, and that he did. However, he did not discharge Bettner. (T. 356-357). Bettner never indicated to Pierce that he wanted to remain with the company or that he did not want Lape to turn in his resignation. (T. 361).

When Bettner and Pierce later had a conversation concerning how Pierce should respond to a reference inquiry from a prospective employer, CX Roberson, Bettner advised Pierce to tell Roberson that he had quit. (T. 365).

In a handwritten letter sent to OSHA Regional Administrator Michael G. Connors, dated February 7, 1999, Bettner stated that he would like to file a charge against Daymark under the STAA and described the subject matter of the charge. He did not indicate that Daymark had discharged him, although he wrote that the charge "will also concern a constructive process to get to quit Daymark." (RX 11).

ISSUES ON APPEAL

- (1) Whether Daymark did not promptly restore Bettner to full health benefits because Bettner engaged in protected activities.
- (2) Whether Daymark issued two unsatisfactory performance reports to Bettner because Bettner engaged in protected activities.
- (3) Whether Daymark's treating Bettner's November 13, 1998 Qualcomm message ("AT THE PRESENT TIME THIS WILL BE MY LAST LOAD FOR DAYMARK.") as a resignation was a discharge motivated by Bettner's participation in protected activities.

(4) Whether Bettner was constructively discharged because he engaged in protected activities.

(5) Whether, after receiving Bettner's November 13 Qualcomm message, Daymark did not continue Bettner's employment, reinstate, or rehire him because Bettner engaged in protected activities.

POSITIONS OF THE PARTIES

Bettner argues that the ALJ erred by failing to find that by stopping to sleep because he was fatigued or sleepy (from 11:30 p.m. August 26, 1998, to 1:30 a.m. on August 27, 1998, and 2:00 a.m. to 6:00 a.m. on August 27, 1998, and from 11:15 p.m. on September 2 to 4:45 a.m. on September 3, 1998) he engaged in protected refusals to operate a motor vehicle (under 49 C.F.R. § 392.3), that Daymark had notice of that protected activity, and that Daymark's issuance of unsatisfactory performance reports for late delivery on August 27 and September 3, 1998, constituted adverse employment action in response to that protected activity. He also contends that the ALJ erred in finding that Daymark did not discharge him. Further, he urges that Daymark has not articulated legitimate nondiscriminatory reasons for its adverse actions, and that its articulated reasons are pretextual. Bettner suggests that the ALJ's findings that he engaged in protected activity by participating in activities related to his prior STAA complaint against Daymark and by making safety-related complaints are correct. In addition, he supports the ALJ's determination that Daymark violated the STAA by failing to promptly provide health insurance benefits.

Daymark contends that the ALJ erred by finding that it violated the STAA by paying Bettner's insurance claims belatedly. It submits that the delay occurred solely because Bettner refused to fill out the necessary insurance forms. Further, it argues, any violation which occurred was at most a violation of the reinstatement order and Settlement Agreement in Bettner's prior STAA case, Bettner could have filed a motion to enforce the Settlement Agreement but failed to do so, and Daymark processed Bettner's claims before he brought this case. Therefore, it urges, there was no violation of the STAA here. However, it states that in the event the ALJ's finding of a violation is affirmed, Bettner is not entitled to attorney's fees because Bettner's attorney did not engage in any activity that resulted in any affirmative action to abate the violation or any other remedy. Daymark otherwise supports the ALJ's findings and conclusions.

STAA REQUIREMENTS

The STAA provides in pertinent part:

Prohibitions – (1) A person may not discharge an employee, or discipline or discriminate against an

employee regarding pay, terms, or privileges of employment because –

(A) The employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because –

- (1) the operation violates a regulation, standard, or order of the United States related to the commercial motor vehicle safety or health; or
- (2) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105.

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity, 2) his employer was aware of the protected activity, 3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action. *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Env't'l Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*,

836 F.2d 226, 228 (6th Cir. 1987).⁹ The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

DISCUSSION

Before this Board, Bettner submits that Daymark took five adverse actions against him because he engaged in protected activity: to wit, it illegally discriminated against him by: 1) failing to promptly pay his medical bills, 2) issuing an unsatisfactory performance report in connection with a delivery to Chattanooga, Tennessee on August 27, 1998, 3) issuing an unsatisfactory performance report in connection with a delivery to Fogelsville, Pennsylvania on September 3, 1998; 4) discharging Bettner; and 5) not rehiring Bettner or allowing him to rescind his conditional "resignation." Complainant's Brief Supporting In Part, And Opposing In Part, The ALJ's Recommended Decision and Order (C. Br. R. D. & O.). We note that before the ALJ, Bettner also contended that he was constructively discharged because of the unpleasant conditions created by Daymark's issuance of the two unsatisfactory performance reports, refusal to pay any part of the lump sum charge, deduction from his pay for locksmith services, refusal to pay delay pay for the Fogelsville delivery, and refusal to pay Bettner's medical charges. Complainant's Post-Hearing Brief at 21-24 (C. P-H Br.). We consider each of these allegations in turn, and whether the ALJ's findings with respect to them are supported by substantial evidence.

Because this Board defers to an ALJ's credibility determinations which are based on the witnesses' demeanor, we note at the outset that the ALJ found the testimony of Bettner and his wife was generally creditable, that Baker and Pierce were "forthright and credible" witnesses, and that Singleton was credible, with the caveat that he was not at Daymark during the Bettner issue, and that his testimony therefore should be given appropriate limitation and weight. (R. D. & O. at 5-7). He found the deposition testimony of Lape added little to the case and gave it no weight. *Id.* at 8.

Health Insurance and Payment of Medical Claims

Bettner charges that Daymark violated the agreement settling his prior STAA case because he was not promptly provided full medical benefits when he was reinstated to work, and that that settlement agreement violation also constitutes a new and separate violation of the STAA. The ALJ agreed, concluding that the violation was de minimus

⁹ The parties in this case stipulated that Daymark is an employer subject to the STAA and that Bettner, similarly, is an employee within the purview of the STAA. (See R. D. & O. at 3, T. 3).

and no further remedy was required. He separated the health benefits issue from the other issues raised by Bettner, finding that Daymark's failure to promptly provide benefits was related solely to the resolution of Bettner's prior complaint and was unrelated to any protected activity occurring after his reinstatement. We agree that the violation of a settlement agreement *may* constitute a new and separate STAA violation. *See Gillilan v. Tennessee Valley Auth.*, 91-ERA-31, slip op. at 5 (Sec'y Aug. 28, 1995) and cases cited therein. However, to qualify as a new discriminatory act, the settlement agreement violation must meet all of the required criteria of a STAA violation. *See* STAA Requirements above. The delay in reinstatement of Bettner's medical benefits here does not do so.

Bettner's prior STAA claim and his participation in the prior STAA proceeding was protected activity under 49 U.S.C.A. § 31105(A). Moreover, Daymark certainly was aware of that activity. However, assuming that the failure to promptly pay Bettner's medical bills constituted adverse action under the STAA, the critical element of causation is not established.¹⁰ On this record, Daymark has provided a legitimate, nondiscriminatory explanation for the delay in providing payment, and Bettner has not shown that that explanation is not credible or is pretext for discrimination.

According to the testimony of Pierce and Baker, which the ALJ found wholly credible, the delay in placing the Bettners under Daymark's health insurance coverage was caused by Bettner's failure to complete the forms which Daymark and its insurance company considered necessary to enroll the Bettners in the insurance plan and process the Bettners' medical claims. The testimony also suggests, but does not establish, that there may also have been some delay with respect to payment of the Bettners' claims for pre-existing conditions because (as described below) Pierce thought they had insurance coverage through another trucking company during the period preceding Bettner's reinstatement.

More specifically, Baker testified that everybody in the company was required to complete a new enrollment form so that the insurance company could place all the personal information for the employee and dependents in the system and so that payroll had authorization to make deductions for premiums paid by the employee. (T. 297, 301). Bettner refused to complete the enrollment form until July, despite being counseled at length about it by Pierce. (T. 319). Although it may have been bureaucratic, there is no evidence that the requirement that the enrollment form be completed was a pretext for discrimination.

The insurance company also sent Bettner a letter requesting that he submit a certificate of prior coverage. That letter was routinely sent to all employees hired after

¹⁰ The ALJ made no specific finding as to causation with respect to the delay in paying health claims.

the switch in insurance companies. (T. 292). Because he was under the impression that Bettner had insurance with his prior employer, and because submission of the certificate would enable Daymark to cover Bettner's claims for pre-existing conditions under its excess insurance coverage, Pierce also requested that Bettner submit the certificate. (T. 326, 327). When Bettner told Pierce that he had not had qualifying prior coverage, Daymark paid the claims out of pocket. (T. 328). Both Baker and Pierce testified that to their knowledge the Bettners' insurance claims were not held up in retaliation for anything. (T. 301, 320).

The evidence thus does not show that the delay in paying Bettner's health claims was motivated by Bettner's protected activity. Bettner therefore has not proven all the requisite elements of a STAA violation. Consequently, we do not adopt the ALJ's determination on this issue.

Unsatisfactory Performance Reports:

Unsatisfactory Performance Report for Late Delivery of August Load to Chattanooga and Failure to Weigh Load

The ALJ determined that this report was issued for legitimate nondiscriminatory reasons and there was no discriminatory conduct presented in Daymark's treatment of Bettner. We agree.

There were two elements to this report, the overweight ticket, and the late arrival. Before this Board, Bettner does not contest the overweight ticket aspect of this report. We therefore simply note that the record supports the finding that Bettner violated Daymark policy by failing to weigh the load, and that the unsatisfactory performance report for the overweight ticket merely reflects that failure. (T. 345, 385, 406-407, RX 7, p. 11-8).¹¹

As to the late arrival, the ALJ found that Bettner was not clearly giving messages to dispatch that he was stopping due to being fatigued when he made such stops, and Bettner did not notify Daymark in a timely and exact manner when he had to divert from schedule. (R. D. & O. at 19, 21). In addition, the ALJ noted that Bettner informed Daymark of his arrival belatedly. (R. D. & O. at 43). Daymark issued this portion of the

¹¹ The ALJ also found that a portion of the delay could be attributed to time spent when Bettner received the overweight citation. He found that this constituted at least a half hour. (R. D. & O. at 274). Since Bettner's log shows that he spent 45 minutes at the scale in Seymour, Indiana (CX 1, p. 15) and he testified that he would have spent a half hour weighing the load had he complied with Daymark policy (T. 274), the evidence is that at least fifteen minutes of the delay is attributable to the overweight citation.

report, the ALJ found, because Bettner failed to timely notify Daymark of his sleeper berth stops and to provide a complete and adequate explanation of why he was late (R. D. & O. at 19, 21, 41, 43).¹² Moreover, Bettner's failure to note the axle problem in the log book, and the absence of records citing a problem with them constituted part of Daymark's reason for issuing him a warning notice for late delivery. (R. D. & O. at 43).¹³ In other words, because Bettner failed to timely notify Daymark and thereby secure appropriate adjustments in the delivery time for his stopping to sleep when tired, and because he did not provide acceptable explanations accounting for all of the time that he was late, his performance was judged against the 1500 delivery time and found unacceptable. These findings are supported by substantial evidence (Pierce's testimony that Bettner did not provide timely notification (T. 384, 386); Pierce's testimony that Bettner did not advise him at the October 1 meeting that he was late because he was fatigued or sleepy, (T. 346); Pierce's October 6 letter (JX 11 p. 2); Lape's Deposition, p. 25, 36-37). We note that Bettner's testimony that he advised Daymark that he had stopped because he was too tired to drive safely was impeached by his affidavit in which he said he had told Daymark it was too far. (T. 223). We also note that Pierce's October 6 summary states "Overweight ticket (8-27-98)You were also late on the load. You explained that it took you two and one half hours to get the trailer slide to work which caused you to be late. This is an excuse as you state a mechanical problem and did not send a qualcomm message per the handbook." (JX 11, p. 2.). This supports the findings that Bettner was considered late because he failed to send the required Qualcomm messages, and that Daymark doubted Bettner's axle-shifting story. Pierce's testimony that he also doubted Bettner's explanation about axle-shifting because he did not have any evidence that Bettner had an axle problem, Bettner never requested assistance and did not report the problem during the trip, and no subsequent driver reported a problem, also give substance to the ALJ's finding that the absence of evidence confirming Bettner's axle-shifting explanation played a role in issuance of the unsatisfactory report

¹² The ALJ noted that Bettner's stopping to sleep did not fully account for his late arrival. (R. D. & O. at 43).

¹³ The ALJ places this finding in the context of the September 3 Fogelsville trip; however, the only trip involving alleged axle problems is the Chattanooga trip. (R. D. & O. at 25, 43, T. 80-81). We note that earlier in the ALJ's opinion he recounts Bettner's testimony concerning the axle problem in the context of the Chattanooga trip and subsequently states that Bettner's log shows that "he arrived in Indianapolis at 11:00 p.m., that the delay was due to the axle problem...." (R. D. & O. at 16, 18). Bettner's log shows on-duty not driving time, but no notation as to what work was being done at the time. (CX 1, p. 14).

for late delivery (i.e., Daymark did not accept Bettner's explanation for being late). (T. 345-347, 389-390, 395, 396). ¹⁴

We note that the October 6 summary makes no mention of any claim by Bettner that he stopped to sleep because driving would have violated DOT's fatigue rule (or that he had a reasonable apprehension that it would have violated the DOT rule and so advised Daymark). Moreover, Pierce did not recall Bettner making any such claim at the October 1 meeting. In his October 22 rebuttal statement, Bettner suggested that the trip scheduling violated DOT's 15-hour rule. He did not indicate that he was so sleepy or tired that driving would have been unsafe. At the hearing, he conceded that he had a fresh 15 hours as of the morning of the August 27 and could have driven for ten hours, but only drove for 5 ¼ hours the rest of that day. Moreover, he admitted that on the morning of August 27 he could have driven another 10 hours without violating the 15-hour rule. Consequently, Daymark might not have been fully aware of Bettner's alleged protected activity of stopping to sleep because of fatigue when it issued the unsatisfactory performance report.

Bettner does not argue before us that Daymark would have required him to violate DOT's hours of service regulations. The ALJ's findings that DOT's hours of service rules were not violated are supported by the record, particularly Bettner's log. (R. D. & O. at 43, CX 1, pp. 14,15).

Unsatisfactory Performance Report: September Late Delivery of Load to Fogelsville, Pennsylvania

The ALJ found that Daymark had a logical business basis for its determination that Bettner delivered his load to Fogelsville late and concluded that the evidence was insufficient to support a finding that it was motivated by protected STAA activity. (R. D. & O. at 26). He found that Bettner's problem was his timely reporting, rather than his fatigue and stopping, and that the delay in Bettner's arrival may be solely attributed to Bettner's phone conversation with Pierce. (R. D. & O. at 24, 26). There is substantial evidence to support the ALJ's findings and we agree with his conclusion.

Bettner's deposition testimony that he did not tell Daymark that he was going to have to stop and sleep supports the ALJ's finding that Bettner failed to timely notify Daymark of his stops to sleep. (T. 229, 230). Pierce also testified that he did not recall Bettner saying at the October 1 meeting that he was late in arriving at Fogelsville because

¹⁴ A portion of the delay is also attributable to the time Bettner spent in connection with the overweight citation. That time is not protected activity. Additionally, Bettner does not claim that the time spent adjusting the axles was protected activity.

he was fatigued or sleepy. (T. 346). Thus there is adequate record support for finding that Bettner failed to notify Daymark timely of his stops to sleep.

Perhaps even more significantly, there is ample evidence that Bettner's late arrival was not attributable to his alleged protected activity. Bettner chose to stop and talk with Pierce, and have a snack, for a period of one hour and fifteen minutes. He was late by one hour and one minute. Bettner admitted that he would have been on time, had he not stopped to talk to Pierce. (T. 237). There is no evidence that it was necessary for Bettner to speak to Pierce prior to making the delivery. In addition, as discussed at the October 1 meeting, Bettner also had other opportunities to manage his time to ensure that he arrived timely.¹⁵ (T. 337-338). The unsatisfactory performance warning for being late was entirely consistent with the summary in Pierce's October 6 letter which (in the context of Bettner's request for delay pay) recounts that Bettner's excuse for being late was his being blocked in (not that he had to stop to sleep), and notes, "You accepted the appointment commitment the previous day with ample hours to accomplish.... You admit being late and not eligible for said pay." (JX 11, p. 1). Thus there is ample record support from which to find that Daymark believed that Bettner was late for reasons which were within his control and not related to any alleged protected activity and that it cited him for being late accordingly.

¹⁵ Pierce testified that at the October 1 meeting the Daymark officials "went through his logs and showed him where he could have been there on time if he would have—where it was a very—and it was an easy run to make." He further stated, "But he had spent so much time on the telephone either talking with me or doing other things that he was an hour late, and he was not worthy of delay pay as per the policy." (T. 338). Although Pierce did not specifically identify the time-saving opportunities (apart from the September 3 telephone call to Pierce from Somerset), we note that Bettner took a one-hour dinner break on September 2, 1998, after the driver bringing the Fogelsville load to London, Ohio arrived. That dinner break followed an hour off duty and three hours spent in the sleeper berth while Bettner waited for the other driver. (T. 119-123, 131-135). Bettner had previously spent eight hours in the sleeper berth (from 12:00 a.m. to 8:00 a.m. on September 2). On the morning of September 3, 1998, Bettner spent forty-five minutes at the truck stop, without checking to see if the truck blocking him had left, before inspecting his vehicle for an additional fifteen minutes. Bettner testified that normally his morning breakfast/rest room stop could take as little as fifteen minutes. (T.126-128). Even assuming that Bettner had to stop at some point between Wheeling and Fogelsville, it appears that a shorter stop at Somerset, coupled with spending less time at dinner in London, Ohio would have enabled him to arrive timely. It also appears that Bettner could have left the truck stop in Old Washington earlier (for example by making his fifteen-minute vehicle inspection during part of the forty-five minutes that he spent inside the truck stop). Bettner offered no evidence controverting Pierce's testimony that had he managed his time as Pierce suggested at the October 1 meeting, he would have arrived on schedule.

Treating Bettner's November 13 Qualcomm Message as A Resignation

The ALJ found that at the time Bettner sent his November 13 Qualcomm message ("AT THE PRESENT TIME THIS WILL BE MY LAST LOAD FOR DAYMARK."), it was not a resignation. However, he concluded that Daymark was not motivated by Bettner's protected activity when it treated Bettner as having quit, and that Daymark did not discharge Bettner. He found credible Pierce's testimony that he and Lape understood the Qualcomm message to be a resignation. Further, he found that by November 23, when Pierce sent his letter to Bettner stating that Daymark considered Bettner to have resigned effective November 13, Pierce was justified in believing that Bettner had quit, because the locksmith charge issue had not been resolved as Bettner wished and Bettner had not responded to Pierce's efforts to discuss what he understood to be Bettner's resignation. (R. D. & O. at 33-37, 41-42).

The question here ultimately is not whether Bettner quit, or whether Pierce was justified in believing that Bettner had quit. Rather, it is whether Daymark treated Bettner's message as a resignation because of Bettner's protected activity and whether Daymark's explanation for its actions – that it believed that Bettner had resigned – was pretext for discrimination. We find that the ALJ's determinations in this regard that Daymark did not treat Bettner's message as a resignation because of Bettner's protected activity and did not discharge Bettner are supported by substantial evidence.

Pierce, who the ALJ found to be wholly credible, testified that both Lape and Mrs. Bettner told him that Bettner had resigned, and that both he and Lape understood Bettner's message to be a resignation. Pierce also testified that on November 16 he sought to discuss the resignation with Bettner, but Bettner refused to do so; that Bettner did not call him back as he said he would; and that Bettner failed to respond to other efforts Pierce made (including leaving messages with Mrs. Bettner) to have contact with Bettner regarding the matter. (T. 356-361).

To the extent that there was conflict between the testimony of the Bettners and that of Pierce concerning the substance of the November 16 conversation, the ALJ had the witnesses before him and thus was in the best position to determine credibility. In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB defers to an ALJ's credibility determinations that are based on such observation. *Melendez v. Exxon Chem. Americas*,

ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000). Moreover, the ALJ's acceptance of Pierce's version of events is supported by the relatively contemporaneous November 23 letter in which Pierce set forth a rendition of the facts entirely consistent with both Daymark's actions and Pierce's testimony at the hearing, and by Bettner's failure to contact Daymark to specifically contest Daymark's treatment of the Qualcomm message as a resignation.¹⁶ (RX5, T. 356-373, 394-395). At most, upon being told that his resignation had been accepted, Bettner told Lape, "Don't you think you're jumping the gun?" (T. 171). The ALJ found that this alleged statement to Lape was itself ambiguous. (R. D. & O. at 35). We agree. Certainly, if made, it did not clearly communicate that Bettner had not resigned. To the contrary, it would be consistent with Bettner's having resigned, but being willing to rescind the resignation upon a favorable resolution of the locksmith charge.

Thus, the record fully supports a finding that Daymark treated Bettner's November 13 message as a resignation because that was how it actually interpreted what he had written. Based on the record, Bettner has failed to show by a preponderance of the evidence that Daymark's explanation was pretextual and that Daymark treated Bettner as having resigned in retaliation for his protected activity.

Failure to Rescind the "Resignation" or "Discharge" or to Rehire Bettner

Bettner contends that Daymark failed to allow him to rescind his "resignation" or its alleged discharge, and refused to rehire him, because of his protected activity. The ALJ found that Daymark had no obligation in this regard, and offered a legitimate non-discriminatory reason (Bettner's abusive treatment of Daymark's employees and its insurer's personnel) for its actions. (R. D. & O. at 42). We agree with the ALJ that Daymark had no obligation to rescind what it understood to be Bettner's resignation. Moreover, it was not required to rehire Bettner when it was dissatisfied with his conduct or previous work record. *See Becker v. West Side Transp., Inc.* ARB 01-032, ALJ 2000-STA-4 at 7 (Feb. 27, 2003) (Company not required to rehire employee who quit his job and subsequently changed his mind; employee's conduct toward company employees constituted legitimate, nondiscriminatory reason for refusal to rehire). However, we also note that Bettner has not shown that he actually requested that Daymark rescind what it understood to be his resignation, or that it rehire him.

Bettner's only evidence that he sought such action is his testimony that he responded to the news that his resignation had been accepted by saying "Don't you think you're jumping the gun?". Such a response, as the ALJ found, and we agree above, is ambiguous. It is not an explicit request that he be allowed to rescind his resignation

¹⁶ Bettner's failure to do so is anomalous, and quite inconsistent with his position that he did not resign, since the testimony establishes that he had generally called Pierce at least once a week to discuss matters which concerned him. (T. 321).

request, or that Daymark rescind what Bettner alleges was his discharge. Certainly it is not a request for rehiring, despite Bettner's contention that his comment to Lape was "the equivalent of applying for a truck driving job with Daymark." C. Br. R. D. & O. at 21. Pierce specifically testified that Bettner never contacted him seeking to rescind the resignation or alleged discharge, or to be rehired, even though Bettner previously had called him at least once a week. (T. 321). Further, Bettner brushed off Pierce's efforts on November 16 to discuss the November 13 Qualcomm message, did not subsequently respond to his requests to discuss the matter, did not respond to Pierce's November 23 letter, and did not speak to Pierce again until Pierce again initiated contact because he had received a reference request from another employer. (T. 356-365). These facts, found by the ALJ and supported by record evidence, militate against finding that Bettner ever sought to rescind his November 13 message, although he knew Daymark was treating it as a resignation, or ever asked Daymark to rescind his alleged discharge or to rehire him. *See* R. D. and O. at 36-37. Bettner cites no support for the proposition that Daymark was obligated to rescind his resignation, or to rehire him, solely on its own initiative, and we know of none apposite. There is thus no basis for finding that Daymark did not rescind the resignation or alleged discharge or rehire Bettner because of Bettner's protected activity.

It is true that Baker, when asked by counsel whether Daymark would rehire Bettner, responded that the company *probably* would not rehire him because of the way in which he had treated Daymark's employees; however, that is in the realm of the hypothetical and did not constitute a bona fide application by Bettner for re-employment and an actual refusal of employment by Daymark. (T. 446-447). Had there been such a refusal to rehire, we would agree with the ALJ that the explanation proffered by Baker constituted a legitimate non-discriminatory reason for not rehiring him. The record evidences that Bettner cursed while on the phone with Daymark employees and was therefore told to call Pierce directly, not anybody else, and that he was "bad" with Daymark's office staff, and the staff of the company administering Daymark's health insurance; the third-party administrator complained that Daymark was verbally abusive and so disruptive that they could not let a claims manager work with him. Further, Baker, who previously received Bettner's calls when Pierce was out of the office, and now would be the person having to deal with Bettner (because the company no longer has a vice-president for human resources) does not want to have to deal with his unpleasant attitude. (T. 239, 323-325, 446-447). None of the reasons cited by Baker constitute a refusal to rehire based on protected conduct.

Constructive Discharge

Before the ALJ, Bettner listed the conditions created by six Daymark actions (the two unsatisfactory performance reports, the refusal to pay the lump sum charge, the

deduction for locksmith services, the refusal to pay delay pay for the Fogelsville delivery, and the refusal to promptly pay medical claims)¹⁷ as constituting the basis for his constructive discharge claim. The ALJ found (with the exception of the refusal to promptly pay the medical claims concerning which he made no finding) that Bettner's protected conduct motivated none of these actions by Daymark. Moreover, he found that they did not render his working conditions so difficult, unpleasant or unattractive that a reasonable person would have felt compelled to resign. (R. D. & O. at 21, 26-27, 29, 33, 40, 44). See *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14, 97-ERA-18-22, slip. op at 67 and cases there cited (ARB Nov. 13, 2002). See also *Henry v. Lennox Indus.*, 768 F.2d 746, 751-752 (6th Cir., 1985); *Ford v. General Motors Corp.*, 305 F.3d 545, 554 (6th Cir., 2002) ("A constructive discharge exists if working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign...."). We agree. Daymark's actions were consistent with the employee-employer relationship and would not have been intolerable for a reasonable person. Moreover, Daymark enunciated legitimate, nondiscriminatory reasons for each action and Bettner failed to show that those reasons were not credible or were a pretext for discrimination under the STAA. The reasons for the two unsatisfactory performance reports and the delay in paying medical benefits are discussed above; the lumper charge was not paid because Daymark considered it too high, it was not pre-approved, and only one lumper was listed on the claim submission although the amount claimed was for two persons. (T. 341-344, T. 150-152, 243-245, JX9); Daymark deducted the locksmith charge because it believed it had authority to do so and that Bettner had violated company policy by leaving his keys in the truck (T. 245, 355, 356, JX 21, RX 10: Tab 10, Section 49); and Daymark did not pay delay pay because it did not make such payments to drivers who delivered their loads late (T. 340-341, JX 11, p. 1). Moreover, the record does not show that these actions, despite their

¹⁷ In his post-hearing brief before the ALJ, Bettner cited the two unsatisfactory performance reports, the refusal to pay the lumper charge, the deduction for locksmith services, the refusal to pay delay pay for the Fogelsville delivery, and the refusal to promptly pay medical claims, as the basis for his constructive discharge claim. In his testimony, Bettner cited the deduction for locksmith services, short runs, Daymark's taking his truck away, the refusal to pay the lumper charge, and the refusal to pay medical claims, as the reason he sent his November 13 Qualcomm message. With the exception of the failure to promptly pay medical claims (which he found was a violation of the STAA) and the taking of the truck (which was not cited by Bettner in his brief and was not dealt with by the ALJ's R. D. & O.), the ALJ found that Daymark provided legitimate non-discriminatory reasons for its actions with respect to each of these issues. We note that Daymark offered a legitimate, nondiscriminatory reason for taking the truck – which was to keep it in use making money for Daymark during the period it would otherwise have been out of production during Bettner's vacation. (T. 322). We also have found, as explained above, that Daymark offered a legitimate, nondiscriminatory reason for the delay in paying medical claims.

apparent legitimacy as individual acts, constituted parts of a plan, established as a consequence of Bettner's protected activity, to make Bettner quit his employment with Daymark.

Protected Conduct

Bettner urges us to find that he engaged in protected conduct by sleeping on certain occasions, arguing that those stops to sleep were refusals to drive in violation of the DOT fatigue rule or refusals to drive based on a reasonable apprehension that driving would violate the rule. Further, he asks us to find that the ALJ misinterpreted the legal standard for a protected refusal to drive and incorrectly found that Daymark did not have notice of Bettner's protected activity. Because we have found that Daymark set forth legitimate, nondiscriminatory reasons for its actions and Bettner failed to show that those reasons were false or were pretexts for discrimination, Bettner failed to sustain his burden of proof with respect to an essential element of his claims (causation) and cannot prevail. We therefore decline Bettner's invitation to address additional issues relating to protected conduct.

We agree with the ALJ's finding that there is no question that Bettner engaged in protected conduct by filing his prior STAA complaint against Daymark (and, we also find, by participating in the proceeding pertaining to that complaint). (R. D. & O. at 39) *See* 49 U.S.C.A. § 31105(a) (1)(A). We also agree that safety-related complaints raised to an employer may qualify for STAA protection. *See Leach v. Basin Western, Inc.* ARB No. 02-089, ALJ No. 02-STA-5, slip.op at 3, *Spinner v. Yellow Freight*, No. 90-STA-17, slip op. at 8-9, 10, 11-12 (Sec'y May 6, 1992), *aff'd sub nom. Yellow Freight v. Martin*, 983 F.2d 1195, 1198-99, 1200 (2d Cir. 1993), and that it is possible that some of Bettner's complaints to Daymark may therefore qualify as protected activity.¹⁸

¹⁸ The ALJ did not specifically identify those occasions when Bettner raised "complaints to Daymark management about its trip scheduling and planning" which were causing him to be tired or fatigued" within the meaning of the Act (R. D. & O. at 40) or "the comments Mr. Bettner made to management about working more hours than expected and needing more time off in such circumstances," *id.*, or evaluate whether Bettner had a good faith belief regarding the existence of a violation. *See Leach v. Basin Western, Inc.*, slip op. at 3 ("Under the complaint clause, it is necessary that the complainant at least be acting on a reasonable belief regarding the existence of a violation."). It is therefore difficult to assess whether substantial evidence supports his findings that some of Bettner's complaints qualified as protected activity.

CONCLUSION AND ORDER

For the preceding reasons we do not adopt the ALJ's recommendations regarding the portion of Bettner's complaint relating to payment of health insurance and medical benefit payments. We do adopt the ALJ's recommendations with respect to Bettner's complaint in all other respects. Accordingly, we **DISMISS** the complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge